IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0146
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
WESLEY TODD WICKHAM,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20034027

Honorable Kenneth Lee, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann
Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Frank P. Leto
Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Wesley Todd Wickham was convicted of possession of a deadly weapon by a prohibited possessor and resisting arrest. After a bench

trial, the trial court found Wickham had two historical prior felony convictions in CR-53851 and CR-53811 and sentenced him to a mitigated, eight-year prison term for the weapons misconduct conviction and a concurrent, presumptive term of 3.75 years for resisting arrest. On appeal, this court rejected Wickham's challenge to the sufficiency of the evidence but agreed the state had not sustained its burden of establishing by clear and convincing evidence that he had two historical prior felony convictions. We affirmed the convictions but vacated the sentences and remanded the case to the trial court with directions to redetermine whether Wickham had two historical prior felony convictions and to resentence him. *State v. Wickham*, No. 2 CA-CR 2004-0285 (memorandum decision filed Nov. 30, 2005). In this appeal from that resentencing, Wickham maintains the trial court erred when it rejected his agreement with the state that he would admit having one historical prior felony conviction in exchange for the dismissal of the allegation about the other and stipulate to the imposition of presumptive prison terms. We affirm.

¶2 Defense counsel informed the trial court before trial on the allegation of prior convictions that Wickham would admit having one prior conviction in CR-53851 and agreed he would be sentenced to the presumptive prison term on the weapons misconduct charge, not the mitigated term the court previously had imposed. As Wickham points out, the trial court commented with respect to this court, "[I]t looks like someone up there just never got around to looking at the full record, because if they had . . . it demonstrates the multiple priors. Multiple priors." The trial court was referring to the records in CR-53851 and

CR-53811 of which it had taken judicial notice before initially sentencing Wickham. Several of those prior convictions apparently had been vacated. The trial court questioned whether it was required to accept the sentencing agreement and stated it was not sure it was willing to accept "whatever pleas or agreements the state and the defense . . . entered into when it's just a matter of the court of appeals just didn't look at the files."[1] The court then stated it would have the prosecutor present the evidence he had and set the case for trial on the prior convictions allegation.

¶3 At that trial, the court commented again on this court's purported failure to review the records in CR-53851 and CR-53811, questioning whether Wickham "should . . . benefit from the Court of Appeals not doing their job." After further discussions about the implications of this court's decision on appeal, the prosecutor stated he was ready to proceed with the trial on the prior convictions allegation, at which point, the trial court proceeded to trial, thereby rejecting the agreement. After a Pima County attorney's office detective and latent fingerprint expert testified and exhibits were admitted, the trial court took judicial notice of the records in CR-53851 and CR-53811 and took the matter under advisement, later finding the allegations of at least two prior convictions had been proved.

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[1]Given the trial court's repeated comments that this court "just never got around to looking at the full record" and "never bothered to look at the files," we are compelled to note that the files of which the trial court had taken judicial notice were not provided to this court as part of the record on appeal. This court diligently reviewed the record available to it in deciding the first appeal. And even if the trial court disagreed with our first decision, its negative remarks suggesting this court somehow shirked its duty are not only factually unfounded but also ill advised and unproductive.

¶4 At sentencing, defense counsel objected to the court's having rejected the sentencing agreement between Wickham and the state. The trial court then sentenced Wickham to the same concurrent prison terms: a mitigated eight-year term and the presumptive term of 3.75 years.

¶5 Wickham maintains, essentially, that the trial court was "not pleased with" him or this court because of his appeal and its outcome. Wickham suggests this displeasure influenced the court's decision to reject the agreement he and the prosecutor had reached before the new trial on the prior felony convictions allegation. And, he argues, the trial court's rejection of the agreement violated the separation of powers doctrine because the court interfered with the state's charging authority.

¶6 Although Rule 17.4(a), Ariz. R. Crim. P., 16A A.R.S., gives the parties in a criminal proceeding the right to "negotiate concerning, and reach an agreement on, any aspect of the case," it is for the trial court to determine whether to accept or reject such an agreement in the exercise of its discretion. *Espinoza v. Martin*, 182 Ariz. 145, 147, 894 P.2d 688, 690 (1995); *see also State v. Lee*, 191 Ariz. 542, 544, 959 P.2d 799, 801 (1998) (trial judge has "wide latitude" to approve or reject a plea bargain). The court must determine whether the agreement is appropriate under the circumstances; when, as here, there is a stipulated sentence, the court must exercise its sentencing discretion and, after conducting an individualized inquiry, determine whether the sentence is appropriate before accepting the agreement. *See Espinoza*, 182 Ariz. at 147-48, 894 P.2d at 690-91.

¶7 It is apparent the trial court was critical of this court and disagreed with our decision on appeal. It appears, too, that the court was directly or indirectly frustrated with Wickham, believing he had admitted he had been convicted of two felonies but had challenged on appeal the sufficiency of the evidence establishing the existence of those prior convictions. Ultimately, however, Wickham has not established the trial court abused its discretion in rejecting the proposed agreement. The state only agreed to withdraw the enhancement allegation for one of the alleged prior convictions, which provided for an enhanced, presumptive prison term. The court clearly felt the initial terms it had imposed were appropriate and saw no reason to change them.[2]

¶8 Nor did the trial court interfere with the state's authority to decide what charges to bring or dismiss. As we previously stated, the state and Wickham's proposal was essentially an agreement that Wickham would admit having one prior felony conviction in exchange for the dismissal of the remaining allegation, with the stipulation that presumptive prison terms would be imposed. Though it could have, the state did not, as it correctly points out in its answering brief, dismiss one of the allegations or amend its enhancement allegation to reflect Wickham previously had been convicted of one, rather than two, felonies. Rather, it only agreed it would do so as part of a proposed sentencing package. Thus, the trial court did not violate the separation of powers doctrine by rejecting the

[2]Because the terms imposed on resentencing were not more harsh than those originally imposed, notwithstanding the court's derogatory comments, *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969), is not implicated.

proposed agreement, never having taken from the state its independent authority to delete one of the prior convictions in its enhancement allegation.

¶9 In this respect, this case differs from *State v. Superior Court*, 180 Ariz. 384, 884 P.2d 270 (App. 1994). There, the state sought to withdraw a request to transfer a minor for criminal prosecution for a variety of reasons, including the fact that the prosecutor did not believe the juvenile was as culpable as another juvenile involved in the incident at issue. *Id*. at 386, 884 P.2d at 272. The prosecutor told the court he was "'confident'" the juvenile would cooperate and provide information against the other juvenile and assist officers in solving other crimes. *Id*. The trial court would not permit the state to do so. *Id*. Granting special action relief, Division One of this court held that "the prosecutor's power to make the initial decision to seek the prosecution of a juvenile as an adult includes the power to revoke that decision." *Id*. at 385, 884 P.2d at 271. The court added: "Just as a trial court cannot prevent the prosecution from dismissing charges against a criminal defendant, a juvenile court cannot prevent the prosecution from withdrawing a motion to transfer for prosecution as an adult." *Id*. Here, however, the dismissal of the one allegation of historical prior felony conviction was something the state only sought as part of a sentencing agreement. As we previously stated, it never made an independent decision to dismiss or modify the allegation.

¶10 *State v. Murphy*, 113 Ariz. 416, 555 P.2d 1110 (1976), is also distinguishable. There, the trial court required the prosecutor to present evidence of aggravating

circumstances, notwithstanding the fact that the defendant had pled guilty to first-degree murder pursuant to a plea agreement providing that, in exchange for the guilty plea, the state would dismiss other charges and recommend a life term of imprisonment, not the death penalty. *Id*. at 416-17, 555 P.2d at 1110-11. The supreme court noted: "The decision to offer evidence of aggravation or not offer such evidence is the responsibility of the prosecutor." *Id*. at 418, 555 P.2d at 1112. And the trial court had compelled the prosecutor to do something that was "contrary to the wishes of the county attorney." *Id*. at 417, 555 P.2d at 1111. That did not occur here. Again, the prosecutor did not independently move to withdraw the allegation of one of the two historical prior felony convictions and never objected to going forward with the trial and presenting evidence after the trial court rejected the agreement.

¶11 Finding no error, we affirm.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge